

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

YOSEMITE FOODS INC.¹

Employer

and

Case 32-RC-265167

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 439**

DECISION AND DIRECTION OF ELECTION

On August 25, 2020,² International Brotherhood of Teamsters, Local 439 (the Petitioner) filed a petition seeking to represent certain employees of Yosemite Foods Inc. (the Employer) for the purposes of collective bargaining. A hearing was held on September 15 before a Hearing Officer of the National Labor Relations Board (the Board), and the parties were invited to file post-hearing briefs. Prior to the hearing, the sole issue preventing proceeding to an election was the method of conducting the election. The Employer argued in favor of an on-site manual election at the Employer's facility. The Petitioner, while initially stating that it would agree to either a manual or mail-ballot election as determined in the Decision, later took the position that a safe manual election could and should be conducted at the facility absent changes in circumstances, so long as the election be done promptly after the issuance of this Decision.

The petitioned-for unit (Unit) is:

Included: All full-time and regular part-time drivers and driver helpers (lumpers) employed by the Employer at or from its facility located at 4221 E. Mariposa, Suite A, Stockton, California.

Excluded: Employees working form a temporary employment agency, managers, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

¹ I grant the parties' joint motion made at the hearing that, to the extent that the formal documents in this proceeding do not correctly reflect the names of the parties, they be amended to correctly reflect the names set forth above.

² All dates hereinafter are in 2020 unless indicated otherwise.

There are presently 25 employees in the Unit.

The Board has delegated its authority to me in this proceeding pursuant to Section 3(b) of the Act. Accordingly, I have carefully considered the entire record, the parties' respective position statements, relevant Board law, and the current circumstances surrounding the COVID-19 pandemic in Northern California and specifically in San Joaquin County where the Employer's facility is located. For the reasons described more fully below, I shall direct that a mail-ballot election be conducted.

THE COVID-19 PANDEMIC IN CALIFORNIA AND SAN JOAQUIN COUNTY

COVID-19 represents an ongoing public health emergency that has resulted in over 217,000 deaths nationwide. In light of these risks, the Centers for Disease Control (CDC), in addition to its general guidelines for reducing the spread of the virus by wearing face coverings, avoiding large gatherings, and maintaining social distancing, issued recommendations for conducting elections encouraging officials to "consider offering alternatives to in-person voting if allowed," noting that "[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19."³ The CDC further noted that although the virus can survive for a short period on some surfaces, "it is unlikely to be spread from domestic or international mail, products, or packaging," which can be sanitized as an extra precaution.⁴

The CDC has long acknowledged that COVID-19 can even be spread by people who do not have symptoms and do not know that they are infected, reinforcing the need for social distancing and face coverings in public settings. Moreover, the CDC noted, the recommended screening of employees by their employers may not be completely effective because asymptomatic individuals or even those with mild or non-specific symptoms may pass through a screening and then unknowingly expose others to the virus.⁵

Further, the CDC notes that critical infrastructure employees like those in the meat processing industry should not be automatically reintegrated into the workplace following exposure to the virus even if they are asymptomatic, and recommends that staying home may still be the most preferred and protective option to protect the employee and others.⁶

Most recently, on October 5, the CDC updated its COVID-19 website to acknowledge that airborne transmission plays a vital role in the spread of the virus, especially in enclosed spaces that have inadequate ventilation.⁷ Specifically, the CDC noted that although the main

³ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>

⁵ <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html> . Updated September 14, 2020 (last accessed October 6, 2020)

⁶ *Id.*

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed October 6, 2020)

method of transmission is through close and prolonged contact within six feet of an infected person, even people more than six feet apart can become infected by tiny droplets or particles emitted from the infected person that can float in the air from minutes to hours. Thus, although people still are more likely to become infected the longer and closer they are to a person with COVID-19, they are also at risk if they are further away for any appreciable period of time.

The State of California has been significantly impacted by COVID-19. As of October 5, according to the CDC, the State of California currently has the highest number of COVID-19 cases in the nation at nearly 827,000, with 16,000 resulting deaths.⁸ The current rate of infection in California is second only to that of Texas.⁹

On March 19, in the early phases of the pandemic, the California Department of Public Health (CDPH) issued Public Health Orders directing all Californians to stay home except to perform essential jobs or to shop for essential needs.¹⁰ Following initial attempts during the summer to lift restrictions on business with certain modifications, however, the number of cases began to increase. Consequently, on August 28, as part of its *Blueprint for a Safer Economy*, the CDPH's Public Health Officer issued California's *Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe*.¹¹

This 4-tier reopening plan (Plan) requires counties in California to show consistent progress in slowing the transmission of the virus before they can progress to the next tier and certain businesses can reopen. The tier progression is purple (widespread transmission); red (substantial); orange (moderate); and yellow (minimal). The purple tier is the most restrictive and keeps most nonessential businesses closed.

San Joaquin County, where the Employer's facility is located, is currently at the red or "substantial" tier, meaning that restaurants, gyms, salons, movie theatres, places of worship, libraries, and other establishments can operate indoors with reduced capacity – generally 25%. Bars, breweries, concert venues, piercing and tattoo parlors, and theme parks remain closed.¹² Any gatherings of those who are not members of the same household are prohibited.¹³ Public schools remain closed, and distance learning has been instituted until such time as the number of cases decreases.¹⁴ Under current CDPH guidelines issued September 8, universal face covering requirements for business are still mandated, although social distancing is only recommended.

⁸ https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/SNFsCOVID_19.aspx

⁹ www.covid.CDC.gov

¹⁰ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>

¹¹ <https://covid19.ca.gov/safer-economy>

¹² The County moved from the purple "widespread" tier to the red "substantial" tier only on September 29. See www.cdph.ca.gov ; www.sjc-StayatHomeOrder.org issued August 25, 2020.

¹³ www.cdph.ca.gov

¹⁴ www.sjgov.org

The elderly and others particularly susceptible to COVID-19 are asked to remain at home, and all others are advised to avoid crowded places and mass gatherings.¹⁵

As of October 5, San Joaquin County, with a population of 762,000, had a total of 20,569 cases of COVID-19 and 471 resulting deaths.¹⁶ The City of Stockton, the site of the Employer's facility and the largest city in San Joaquin County, currently has 9,512 cases of COVID-19 in a population of 311,000 as of October 2.¹⁷

THE EMPLOYER'S OPERATIONS

The Employer operates a meat processing plant in the city of Stockton (the Employer's facility), located in San Joaquin County in central California. This facility, where the Employer engages in swine harvesting, meat cutting and boxing, and delivery of wholesale meat products, contains a cooler warehouse, cut rooms, and a loading dock. The Employer's corporate headquarters are also located here, along with a sales staff and various office assistants.

A total of approximately 240 employees, including some approximately 100 temporary employees, work at this facility. About 120 of them work on the processing side; 15-20 in warehousing; and 25 in trucking. An additional 40 employees, depending on the particular day, work in the cut room. The number of office staff may vary but is generally around 30 employees. The facility operates five days a week. Although business has slowed somewhat as a result of the pandemic, the Employer still processes between 1800 and 2000 swine a day.

The Employer employs about 25 drivers to deliver its product throughout the State of California. Two of the Employer's drivers are Class C drivers, meaning they are licensed to drive heavier trucks: the rest are Class A drivers. In addition to the actual drivers, the Employer also employs driver assistants or "lumpers," who physically accompany the drivers in the truck and assist in loading and unloading and the cleaning of the truck. Not every route is assigned a lumper: rather it depends on the particular route and the number of deliveries on a specific day.

Product is loaded into the trucks from the loading docks on the west side of the facility. The drivers, in addition to delivering product, also unload the trucks (sometimes with the assistance of a lumper) and can help sort the product at the customer's facility. They also ensure that the proper invoices are signed and occasionally collect payments from customers. The lumpers assist the drivers by opening doors, helping unload, and ensuring that the correct product is delivered to the right customer: they also assist in cleaning the truck at the end of the shift.

The Employer maintains a schedule for the drivers and lumpers based on the route and the size of the load, taking into consideration the length of the trip and the traffic involved. For example, a delivery within the Bay Area in Northern California would entail a lot of traffic

¹⁵ www.cdph.ca.gov *Guidance for Face Coverings*

¹⁶ <https://sjcphs.maps.arcgis.com/apps/opsdashboard/index.html#/1234d2c9d6e043709a85f6b519cc8757>

¹⁷ <https://sjcphs.maps.arcgis.com/apps/opsdashboard/index.html#/1234d2c9d6e043709a85f6b519cc8757>

delays which would serve to lengthen the time of the trip beyond what the mere distance would indicate. All routes begin and end at the facility, with most scheduled to depart between 4:00 and 6:00 a.m., and returning about twelve hours later between 4:00 and 5:00 p.m.¹⁸ The shift end-time can vary depending on a myriad of factors and can vary from day to day for each driver. The drivers are rotated in some unspecified way, and not all of the drivers drive on any given day. The record does not indicate whether those drivers who are assigned lumpers always get the same one, or whether that is rotated as well.

The Employer's Response to the COVID-19 Pandemic

The Employer has occupied this facility for about a year: an accurate schematic of the layout was provided showing the relative location of most of the departments, including the warehouse, the carcass coolers, the customer processing area, the administrative offices, and the loading docks where the truck drivers primarily work. The Employer generally segregates workers from different work areas from one another to limit product contamination and promote food safety. To this end, they have separate locker rooms, restrooms, and breakrooms.¹⁹

The Employer contends that it has always maintained a safe and clean facility in compliance with federal and State regulations. However, since the beginning of the COVID-19 pandemic in March, the Employer has promulgated, maintained, and enforced a Standard Operating Procedure (SOP) plan throughout the plant based on guidelines provided by the CDC.²⁰ This SOP includes maintaining social distancing between employees and having dividers in all the breakrooms and in the production area; requiring face coverings; providing hand sanitizing stations and sinks for hand-washing; using directional arrows and floor markings in the facility to control traffic; and staggering lunch breaks to minimize employee contact with one another. The Employer also conducts regular monthly management meetings to ensure accurate communication with the employees with regard to COVID-19 protocols. In addition, the Employer installed special air sanitizers in its 15-18 air conditioning units throughout the plant in order to prevent bacteria and viruses from being recirculated through the facility's ventilation system.

The Employer also regularly uses an outside sanitation service to clean surfaces within the facility to conform to U.S. Department of Agriculture (USDA), OSHA, and CDC standards. Production areas are cleaned daily, and additional sanitation workers have been added since the beginning of the pandemic to meet enhanced cleaning guidelines.²¹ The Employer is and has been subject to random inspections by the USDA to ensure that it provides a safe and

¹⁸ Records prepared by the Employer show that one driver is scheduled from 1:00 a.m. to 1:00 p.m., and two others scheduled overnight from 6:00 p.m. to 6:00 a.m. for deliveries to the Los Angeles area.

¹⁹ The drivers do not have their own breakroom since they are generally on the road for 10-12 hours a day and not in the facility at lunchtime.

²⁰ See *CDC Interim Guidance for Businesses and Employers: Plan, Prepare and Respond to Coronavirus Disease 2019* (February 26, 2020).

²¹ See *CDC Guidance for Cleaning and Disinfecting: Public Spaces, Workplaces, Businesses, Schools, and Homes* (April 23, 2020). The Employer asserts that it exceeds these guidelines.

uncontaminated product to the public. In addition, representatives of the USDA are in the plant daily, as well as a doctor and a veterinarian.²² Offices, administrative areas, and break rooms, which are separate from the production area and the loading dock, are cleaned by inside sanitation employees.

Under the SOP, the Employer regularly screens its employees in the lobby entrance hallway as they report to work each day by taking their temperatures and having them complete a questionnaire based on CDC guidelines. The employees can only use this one entrance, and they are socially distanced while they await their screening, which is conducted by a health-care professional behind a barrier to protect the screener and ensure privacy.²³ If an employee has an elevated temperature or otherwise appears to have COVID-19 symptoms when they arrive at the plant, they are sent home and instructed to see their personal doctor.

Likewise, outside visitors and vendors who enter the building must submit to a similar screening by the receptionist, who takes their temperature and provides them with Personal Protective Equipment (PPE) and thereafter follow all established SOP. Visitors who have elevated temperature or otherwise exhibit symptoms of COVID-19 are told to leave the premises. Those who are permitted to enter the plant, which is not generally open to the public, must wear face coverings and observe social distancing.

The Employer has regularly provided special equipment to employees to enable them to safely do their jobs, including hard hats, hand mitts, glove, aprons, smocks, rubber boots, face shields, and safety glasses. The employees are responsible for cleaning their work clothes, and disposables like rubber gloves or face masks are regularly replaced by the Employer as needed – often several times a day, as well as Personal Protection Equipment (PPE) recommended by the CDC. Work boots are sanitized daily at the facility using quaternary ammonium.

With regard to the drivers and lumpers, they are provided with rubber and cotton gloves and face masks, as well as up to five smocks a day so they can present a clean appearance when they make deliveries to customers. When the drivers and lumpers make a delivery, they are instructed to maintain social distancing and to take the product directly to the customer's cooler so there is minimal contact. Furthermore, they wear face coverings and gloves and use hand sanitizer the entire time of the delivery. The closest contact with a customer is when they are asked by the driver to sign the invoice, which is done in a distanced and expeditious manner.

The Employer tracks all employees and maintains a record, updated daily, of those showing symptoms or testing positive for COVID-19. Following its established SOP procedures, the Employer sends the symptomatic employee home for three weeks or until such time as they

²² The USDA is primarily concerned with the wellbeing and handling of the swine to ensure a safe product.

²³ The Employer explained that it uses a facial thermal scan operated by a trained medical professional that sends an alert if an employee has an elevated temperature as opposed to a hand-held forehead scanner.

were cleared by a doctor to return to work.²⁴ The Employer also identifies any workers who may have had contact with an infected employee and monitors them several times a day thereafter: if any evidence symptoms, they were sent home.²⁵ Signage on electronic bulletin boards in the various breakrooms show the number of COVID-19 infections and number of positive tests on any given day.

Since April, the Employer estimates that it has had about 10-12 cases of COVID-19 at the facility, and that it last had a diagnosed case in mid-August. The Employer did not indicate how many of its employees have been or are currently away from work due to possible exposure to someone with the virus, however.²⁶

The Employer stated it was not aware if any of its drivers had been diagnosed with COVID-19 or if they had, how many there might be.²⁷ The Employer did concede that the drivers, who are largely segregated from the production workers, do come in regular contact with outside customers when delivering product, especially when having invoices signed or helping customers confirm products. The drivers also meet with the transportation manager or human resources personnel and have recently had meetings with an outside labor consultant hired by the Employer. This consultant must submit to the screening performed on all outside visitors to the plant, which includes temperature checking and the completing of a questionnaire. Although this consultant wears a face covering and observes social distancing when meeting with drivers, the Employer did not know if this consultant visited other facilities where such protocols might not be observed.

The Employer acknowledges that there may be asymptomatic employees (those who may have been infected but display no symptoms) at the facility but it is unaware of any since the SOP screening would not necessarily reveal them.

THE EMPLOYER'S POSITION ON THE METHOD OF CONDUCTING THE ELECTION

The Employer has taken the position that an on-site manual election should take place at the Employer's facility in either a large breakroom or outside and has proposed that one session be held from 1:00 p.m. to 6:30 p.m. to accommodate the previously-described schedules of the drivers and lumpers.

²⁴ The Employer confirmed that if an employee were to have an elevated temperature or other symptoms on the day of the election, they would be turned away and not be allowed to vote.

²⁵ The Employer stated that it did not monitor employees' conduct away from the workplace, and therefore does not know if they observe any protocols to prevent contracting COVID-19 when they are not at work.

²⁶ Although the Employer stated that it maintained daily records of the number of cases in the facility, it did not present these records at the hearing. Therefore, the Employer's representative had to estimate based on his best recollection without outside confirmation.

²⁷ Again, the Employer did not present or refer to the records it maintained, so it is not clear whether there may have been or currently are any cases among the drivers.

The Employer cites *San Diego Gas & Elec.*, 325 NLRB 1143 (1998), for the proposition that representation elections should in general be conducted manually at the workplace or other appropriate location. The Employer concedes, however, that in the absence of the COVID-19 pandemic, there would be no reasonable argument to justify ordering a mail-ballot election, since the small number of employees involved are not “scattered” and their hours are not so varied that a manual election would be unfeasible. *Id.*

Moreover, the Employer argues, both parties have agreed that a manual election is appropriate. Nothing about the current pandemic would suggest that an election among 25 employees over a 5 ½ hour time span in a large well-ventilated indoor space (or, in the alternative, a large outdoor space) which is regularly sanitized and where all parties have been provided with and are wearing proper PPE and maintaining social distancing presents such an usual risk which would outweigh the Board’s established policy favoring manual elections.

Furthermore, the Employer asserts that the extended time for the election would not unduly expose the voters to any appreciable additional risk beyond that experienced when they ride together to make deliveries. In fact, the drivers and lumber/assistants will be more isolated from one another during the election than they may be during the course of the workday.

To address the possibility that an eligible employee who has contracted or been exposed to COVID-19 and is self-isolating would be unable to vote in a manual election, the Employer suggests that a mixed manual/mail-ballot election be ordered so that those employees could be provided with mail ballots.

Finally, with regard to the safety of the Board Agents conducting the election, the Employer notes that inasmuch as the facility is only 80 miles from the Region Office, no airplane flight or overnight stay would be required. Furthermore, the Employer argues, its facility is more sanitized and is safer than the Board agents’ office or home.²⁸ Insofar as the observers are concerned, they would not have to be within 30 feet of one another during the course of the election.

Specifically, the Employer has proposed that the election be held in the front processing breakroom adjacent to the offices and front locker room just across from the sausage kitchen. This room measures about 60 feet by 34 feet and there are two entrances to this room, one of which will be used for ingress from outside the facility, and the other for egress directly to the outside parking lot. During the proposed hours of the election, there would be just loading and warehouse employees at the facility, who work in the opposite end of the building as the break room, and the office staff, who work in a separate area. The production workers are generally done for the day by 1:00 a.m., and any remaining warehouse workers in the facility can be physically separated from the voting employees during the polling period. In addition, the

²⁸ As noted below, the Employer suggests that the Board agents could monitor the election remotely, using the same method provided to inspect the polling area prior to the election. The Employer asserts that it would provide an office in the facility, and the proper equipment.

Employer would reschedule other workers who might otherwise be present at the time of the proposed manual voting, and outside visitors would be rescheduled as well.²⁹

In addition to the schematic of the facility, the Employer provided photos of the proposed breakroom area showing a standard workplace lunchroom with a refrigerator, microwave, and vending machine along one wall and lockers and what appears to be storage of lunchboxes and jackets along another. The center area of the room is open and has a number of moveable lunch tables and chairs: each table has large plexiglass shields that separate employees from those next to and across from them that the Employer installed to allow employees to be protected while they ate lunch or took their breaks in this room.³⁰ The Employer confirmed that the table and chairs are not fixed and can be moved to accommodate an agreed-upon arrangement for the election. This breakroom, as well as every other touchpoint in the facility, is regularly cleaned and sanitized by the sanitation staff. To prepare the room for voting, the Employer would clear the room, fog the area, and clean the floors.³¹

The Employer already has markers throughout the facility to encourage social distancing, as well as arrow markers for one-way traffic through the work floor. It will affix dividers as well as markers on the floor to ensure proper social distancing for voters and those who are waiting to vote.

As an alternative to the breakroom, the Employer proposes that the election could also held outside on a patio or courtyard area reached through the egress door from the breakroom. The Employer has already transformed this area adjacent to the parking lot into an overflow break area outside under tents with tables, chairs, and shields similar to those inside the breakroom. The Employer regularly monitors this area by camera to ensure compliance with social distancing.³² There are four exit door from the facility into this area, which the Employer would secure to prevent employees who are not eligible to vote from exiting into the polling area: in addition, the courtyard area would be fenced and/or roped off from the parking lot³³.

If the manual election is held on the outside patio area, eligible employees waiting to vote will be able to line up on the walkway leading into the courtyard: inasmuch as the walkway is at

²⁹ The Employer conceded that it may take some time – even a few weeks – to reschedule production workers because it would entail rescheduling prearranged deliveries of time-sensitive product (i.e., swine). In the alternative, the Employer said it could schedule a shortened work day to accommodate an on-site manual election, but it would be costly because it would require workers to come in on a Saturday when they generally do not work..

³⁰ The Employer maintains separate breakrooms for employees in different sections of the plant: the one proposed for the election is the largest and also has direct outside access. Employees who will be in the facility but will not be voting will be able to use another door to leave the building.

³¹ The Employer already utilizes a CDC approved sanitation chemical – Quaternary Amonium – that it fogs to clean other portions of the facility.

³² The Employer commits to turning off these and other cameras in the facility during the election.

³³ The Employer further purposed that the Board Agent oversee the election remoted via Zoom and confirmed that it had Wi-Fi throughout the facility and could provide a portable webcam for that purpose. This method could be used either in the breakroom or outdoors on the courtyard area. The Board agent could then view and oversee the election remotely from an office within the facility, according to the Employer.

least 60 feet long, there will be ample room for about ten employees to line up and to observe social distancing according to the markers that the Employer will place there. The outside area can be sanitized using portable sanitizers (inasmuch as it cannot be fogged) that the Employer regularly uses around the facility.³⁴

In addition to the foregoing protocols, the Employer stated that it could follow the recommendations in GC 20-10, including certification of cleaning the area before the election; certifications of the party representatives and observers that they have not tested positive for or been isolated due to COVID-19; and that they have not been exposed and are not awaiting results of a COVID-19 test.

The Employer also committed to providing sufficient disposable pencils without erasers to each voter, and to provide glue sticks or tape to seal challenged ballot envelopes, as well as masks, hand sanitizer, gloves and wipes for the election observers. The Employer will also make arrangements for the polling area to be inspected by video before the election. The Employer already enforces the wearing of face covering throughout the plant and will do so for those participating in the election as well.

Based on the foregoing, the Employer argues that an on-site manual election can safely be held at its facility, and that circumstances do not warrant a mail-ballot election.

THE PETITIONER'S POSITION ON THE METHOD OF CONDUCTING THE ELECTION

As noted above, the Petitioner initially took the position that it would agree to either a manual or mail-ballot election so long as the election could take place soon after the Decision and Direction issued. After the hearing, in its post-hearing brief, the Petitioner took the position that it believed that a safe manual election could be conducted at the Employer's facility, assuming that there was no sudden change in the exposure rate in the area or at the facility. The Petition suggests that I could order a manual election and reserve the right to cancel it if circumstances were to change to render it untenable.

The Petitioner reiterated that its primary concern was to ensure a prompt decision and a prompt election soon after issuance. In this regard, the Petitioner argues, the Employer's claim that it would need several weeks to reschedule hog deliveries so as to not have other employees in the facility while the manual election was being conducted should not be used as a basis to delay a prompt election.

³⁴ The Employer has offered to fog the voting booth(s) if necessary.

ANALYSIS

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, *supra* at 1144; citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

It is undisputed that the Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.³⁵ However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, *supra* at 1145.

The Board has recently, in cases involving COVID-19 considerations, expanded on the "extraordinary circumstances" referenced in *San Diego Gas*, *supra*, that would justify a mail-ballot election and held that the totality of the circumstances surrounding the COVID-19 including federal, state, and local government directives limiting travel and how business can be conducted, constituted a valid basis for directing a mail-ballot elections.³⁶

On April 17, consistent with the recognition of the discretion afforded to Regional Directors in extraordinary circumstances in *San Diego Gas*, the Board issued an announcement regarding the COVID-19 pandemic entitled, "*COVID-19 Operational Status*," which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.³⁷

³⁵ I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

³⁶ See, e.g. *Atlas Pacific engineering Company*, Case 27-RC-258742 (May 8, 2020).

³⁷ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>

On July 6, the General Counsel issued its *Suggested Manual Election Protocols* GC 20-10 which reiterated that Regional Directors have the authority, delegated to them by the Board, to make “initial decisions about when, how, and in what manner all elections are conducted. The General Counsel further noted Regional Directors have made and will continue to

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

Recently, the Board has affirmed that it will continue to consider whether manual elections should be directed based on the circumstances prevailing in the Region charged with conducting the election even if the Region is no longer operating under mandatory telework. See *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) and *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020).

After careful examination of the record, the parties’ respective position statements, and the current state of the COVID-19 virus in San Joaquin County and in particularly in the Employer’s facility, I have determined that a mail-ballot election is the appropriate option.

As a threshold matter, I take notice that COVID-19 is an airborne contagious virus for which there is as yet no cure or vaccine. Its effects on the elderly and those with compromised immune systems and other pre-existing conditions are well documented by now. As noted above, federal, state, and local officials all agree that avoiding prolonged exposure to others is an effective way to prevent exposure and possible infection. With this in mind, I have directed several mail-ballot elections in view of the extraordinary circumstances presented by the COVID-19 pandemic, and I have done so out of consideration for the safety of the voters, the observers, the party representatives, and the Board agents. In the instant case, the Employer’s employees have been deemed critical infrastructure employees and, because of the nature of their work, there is no alternative way for them to work remotely. However, the Board has an acceptable alternative to conducting an on-site manual election, and it is one that avoids the risk of person-to-person transmission.

Absent public health concerns described above, I likely would not direct a mail-ballot election in this case. The record shows that the Employer maintains and regularly cleans its facility in accordance with USDA regulations. In addition, the Employer has promulgated additional stringent protocols suggested for meat packing facilities, including enhanced cleaning, improved ventilation, social distancing, PPE, and daily screenings. Moreover, I find that the Employer’s detailed proposals with regard to the conduct of the election at its facility are both extensive and comprehensive and comport with the recommendations in GC 20-10.

Notwithstanding these protocols, I find that the circumstances prevailing in San Joaquin County and in the Employer's facility militate in favor of a mail-ballot election. First, the County has only just recently been upgraded from a "widespread" to a "substantial" infection rate under the State's new tiered system. Consequently, most business may only operate at very reduced levels and certain activities, like mass gatherings, are still banned completely.

In addition to examining the current status in the relevant county, consideration must also be given to the nature of the Employer's business. The CDC recognized fairly early on in the pandemic that targeted, workplace-specific prevention strategies were critical to reducing COVID-19-associated occupational risk.³⁸ Specifically, the CDC, in defining meat and poultry processing facilities as a component of the critical infrastructure within the food and agricultural sector, has further recognized in several of its *Weekly Mortality Reports* the distinctive factors that increase meat and poultry processing workers' risk for exposure to COVID-19. These factors included prolonged close workplace contact with other workers for long time periods, shared transportation to and from the workplace, and frequent community contact with fellow workers. On July 7, the CDC further reported that among 23 states reporting COVID-19 outbreaks in meat and poultry processing facilities, there were over 16,000 cases in 239 facilities, including 86 resulting deaths, in April and May alone.³⁹

On July 9, the CDC, in conjunction with OSHA, released its *Interim Guidance for Meat and Poultry Producers* that further acknowledged that these work environments – processing lines and other areas in busy plants where employees have close contact with coworkers and supervisors – may contribute substantially to their potential exposure.⁴⁰ This publication largely reiterates many of the protocols already being followed by the Employer, including the development of an assessment and control plan, controlling plant traffic, physical barriers, improved ventilation, education and communication, and cleaning and disinfection for work areas. Further recommendations include daily screening and monitoring of workers and avoiding carpooling or using company shuttles. Meat processing employers are also urged to consider "cohorting" (grouping together) workers to make sure that groups of workers are always assigned to the same shifts with the same coworkers to minimize the number of different individuals who come in close contact with each other over the course of a week. According to the CDC, such cohorting may also reduce the number of employees quarantined at any given time due to exposure to the virus.⁴¹ Thus, it is clear from the foregoing that working in a meat processing plant may increase employees' risk of being exposed to COVID-19.

Of particular concern in this case is the fact that despite the Employer's apparently rigorous adherence to state and federal cleaning and safety protocols, there have been at least a

³⁸ <https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm> (last referenced October 5, 2020)

³⁹ <https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm> Morbidity and Mortality Weekly Report (MMWR) July 10, 2020 Update: *COVID-19 Among Workers in Meat and Poultry Processing Facilities*

⁴⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> (last referenced October 5, 2020)

⁴¹ *Id.*

dozen actual cases of COVID-19 at the facility. Accepting this estimate as an accurate number notwithstanding the Employer's failure to produce documentation, this represents 5% of the workforce having been infected despite the Employer's preventative efforts. This, of course, does not account for asymptomatic cases where an employee displays no symptoms of COVID-19 but can still infect others.

While the record reveals that many, if not most, of the CDC's recommendations are followed by the Employer with regard to the food processing workers, it is less clear with regard to the drivers in the petitioned-for Unit. The Employer admits that the drivers and their assistants or "lumpers" ride close together in the same truck that seats only two people for the entire shift, which can be as long as 12 hours. The Employer does not indicate whether it requires that the drivers and helpers regularly wear masks during their entire shifts.⁴² While the drivers are "rotated" through the schedule, it is not known whether they are regularly assigned the same lumper: based on the fact that not all routes require a lumper, it seems logical that the lumper would stay with the route and not with the driver. As a result, the drivers are not "cohorts" in that they are not regularly grouped with others to minimize exposure to others.

This unavoidable prolonged exposure to others in close proximity in a small area without much ventilation is exactly the scenario that the CDC recommends be avoided. Furthermore, unlike the processors, the drivers and the helpers are regularly exposed to others outside the plant during the course of their shift. The record does not reveal how many stops a driver might make on a given day, but it could be several or many during the allotted 12 hours. Inasmuch as the drivers deliver product throughout the State of California, they may regularly travel to counties still ranked in the "widespread" tier of infection. Also, since the drivers are rotated through the routes, they may be regularly exposed to different customers weekly or even daily who may or may not have been screened by their employers for COVID-19. Even though the time of contact with customers may be limited, some of the work like putting the product away, confirming the accuracy of the delivery with the customer, and having invoices signed requires close interaction. Again, this does not serve to limit the drivers' exposure to others who may be infected.

Despite the foregoing, the Employer argues without apparent irony that the drivers would be safer at a manual election than they would normally be in the performance of their work, since at the former they will be socially distanced. This not only tacitly admits that the drivers are at risk while working, but also ignores the fact that at a manual election they would be exposed to other drivers and helpers from other shifts whom they would not normally interact with, actually increasing their potential risk.⁴³

⁴² Even if the Employer mandated that the drivers and helpers wear masks for their entire shift, the Employer would have no way to enforce this.

⁴³ While the Employer suggests that the drivers have little or no interaction with the processing workers, the Employer did agree to rescheduling the processing workers on the day of the proposed manual election – at great expense and inconvenience to the Employer – to avoid any possible interaction with the drivers. This effort to further isolate them suggests that they may have interactions where their shifts cross.

Finally, of further concern to me is the Employer's inability to confirm whether any employees in the petitioned-for Unit of drivers and helpers have been infected. Despite its assertion that it kept daily records based upon its rigorous screening of employees and even daily posted infection and quarantine numbers for its employees, the Employer produced none of these records at the hearing and both of its representatives were unable to provide accurate figures: the Employer's vice president and part-owner could only estimate the number, and a member of its safety committee who oversees the enhanced sanitation screening, purchasing of PPE, and contact tracing under government guidelines was not even asked this question. Moreover, neither of them confirmed that there had been no COVID-19 cases or instances of quarantine resulting from exposure to the virus among the drivers. Failure to provide this crucial information leaves me unable to discuss anything but their potential risk of exposure, as I have done above.

Furthermore, the possibility that drivers may be infected by or quarantined as a result of exposure to COVID-19 between now and the time of a manual election would mean that those employees would not be able to vote in the election, and would be disenfranchised, inasmuch as there is no procedure in a manual election for them to cast an absentee ballot. A mail-ballot election would best address this issue.

In addition, the uncertainty regarding any instances of COVID-19 among the drivers and helpers raises the issue of whether a 5 ½ hour manual election, not including the time needed for the pre-election inspection and conference and the post-election ballot count, poses an undue risk for the Board agent and the observers. While only 25 employees may vote during that time period, the Board agent and the observers will spend the entire time together, resulting in an extended exposure that may not be ameliorated by social distancing and plexiglass shielding. The Employer tacitly acknowledges this heightened risk by suggesting that the Board agent could oversee the election remotely from another room: this alternative does not allow the Board agent to properly perform their duties to conduct the election, oversee the proceeding, and handle the ballots.

In its post-hearing statement of position, the Employer cites *Aspirus Keweenaw*, 317 NLRB No. 13 (Aug. 25, 2020) in support of its contention that a manual election should be held. In *Aspirus*, the Board granted a Request for Review of the Regional Director's ordering a mail-ballot election where both the employer and the petitioner therein had earlier agreed to a manual election at an acute-care hospital. Inasmuch as the Board has not issued its decision as of the date of this decision, the relevance of this case to the instant case is not yet clear. However, a review of the facts in *Aspirus, supra*, shows that it is readily distinguishable from the instant case.

Specifically, the employer in *Aspirus* is located in a rural county in northern Michigan with a population of 36,000 that evidenced only 30 cases of COVID-19 in the entire month of June. In its Request for Review, the employer in *Aspirus, supra*, argued that the Regional Director had misapplied infection statistics in densely populated urban areas like those where the

Regional office was located, instead of those in environs of low density and low COVID-19 cases. The employer further argued that the decision to have a mail-ballot election did not consider the fact that the County where the employer's facility was located was currently at phase 5 of a 6-phase State reopening plan, and relied instead on stale and inappropriate data. As such, the employer argued, the Regional Director abused her discretion by failing to consider the factual circumstances as they existed at the hospital, where apparently no employees had contacted the virus. In contrast, San Joaquin County, with more than 20 times the population of the county in *Aspirus*, is still at the second-highest restrictive tier and the Employer has had at least a dozen cases of COVID-19 at its facility.

For these reasons discussed, I am directing that the petitioned-for election be conducted by mail-ballot as soon as practicable.

CONCLUSIONS

I have considered the evidence and the arguments of the parties, and I conclude that it is appropriate to hold an election among the employees in the petitioned-for unit. As noted above, I have the authority under Section 3(b) of the Act to decide this matter on behalf of the National Labor Relations Board and accordingly, based upon the entire record, I find:

1. The Employer is engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴⁴
2. The parties stipulated, and I so find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 2(6) and (7) of the Act.
4. The parties stipulated, and I so find, that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time drivers and driver helpers (lumpers) employed by the Employer at or from its facility located at 4221 E. Mariposa, Suite A, Stockton, California.

EXCLUDED: Employees working for a temporary employment agency, managers, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

⁴⁴ The parties stipulated, and I so find, that the Employer is a California corporation with an office and place of business in Stockton, California, providing pork and meat products to wholesalers, retail stores, and restaurants. During the past 12 months, the Employer derived gross revenues in excess of \$500,000 and, during that same period, purchased and received goods valued in excess of \$5,000, which originated outside the State of California.

5. The parties stipulated, and I so find, that there is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract of other bar in existence to an election in this matter.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Brotherhood of Teamsters, Local 439**.

A. Election Details

The election will be conducted by mail. The ballots will be bilingual, in English and in Spanish. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **5:00 p.m. on October 27, 2020**. Ballots will be mailed to voters by the National Labor Relations Board, Region 32. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **November 3, 2020**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Region 32 office at (510) 637-3300. The ballots will be commingled and counted by the Region 32 office at **10:00 a.m. on November 17, 2020**. In order to be valid and counted, the returned ballots must be received by the Region 32 office prior to the counting of the ballots.

The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those employees in the unit who were employed during the **payroll period ending October 3, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. The parties stipulated that also eligible to vote in the election are employees in the unit described above who have worked an average of 4 hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike

that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as described above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

The Petitioner waived its right to possess the voter list for 10 days prior to the date of the election and waived its right to file objections over this issue. Thus, to be timely filed and served, the list must be *received* by the regional director and the parties by **October 20, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object

to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. English and Spanish-language versions of the Notice of Election will be sent by the Region separately. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the elections on the grounds that it did not file a request for review of this Decision prior to the elections.

The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations. Unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden, a request for review must be E-Filed through the Agency's website. A request for review may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or why filing electronically would impose an undue burden. A party filing a

request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

The request for review will be limited to the subjects of the method, date, time, and place of the election ordered.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Oakland, California, this 16th day of October 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224